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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-540

WATKINS, ET AL.,
Petitioners,

VS.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Supreme Court of Mississippi (Respondent's Appendix A) is reported as *Watkins, et al.* v. *State,* 262 So.2d 422 (Miss. 1972).

JURISDICTION

Petitioners seek to have this Court grant certiorari to review the decision of the Supreme Court of Mississippi through the authority of Title 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the petitioners waive any objections to the composition of the grand and petit juries?

2. Was the search of the automobile in which petitioners were riding a violation of the Fourth Amendment?

STATEMENT OF FACTS

On or about the 28th day of October, 1970, the petitioners, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, entered the Famous Shop in Laurel, Mississippi. They looked through various articles of women's clothing, made some small purchases, and then left the store. Mrs. Fisher, who worked in the Famous Shop, observed that the three women had been acting suspiciously. Immediately after the petitioners left the store, Mrs. Fisher observed empty hangers on the clothes rack where petitioners had been inspecting various articles of women's clothing. No other individuals had been in the store and the store policy was that empty hangers would not be allowed on the rack. Mrs. Fisher went outside the store and she observed the three petitioners riding alone in a dark green Buick automobile. Mrs. Fisher also observed the automobile park and she observed the three petitioners enter another store. Mrs. Fisher pointed out the petitioner's automobile to a police woman who was standing nearby. (The police had previously been called.) Petitioners were then arrested in the second store and they were carried to the automobile which they had been driving. The automobile was searched and various articles of clothing identified as clothing which was removed from the Famous Shop was found under the front seat of the automobile.

ARGUMENT

POINT I

The Petitioners Failed to Show Systematic Exclusion of Individuals from the Grand and Petit Juries on the Basis of Race.

The Supreme Court of Mississippi has stated that "the mere allegation of discrimination against an eligible class or race as regards selection for jury service is not proof in itself of the presence of such discrimination. And, the burden of proof to sustain the contention is upon the one making the allegation—usually the defendant." *Goldsby* v. *State*, 226 Miss. 1, 86 So.2d 27 at 32 (1956), cert. den. 77 S.Ct. 266, 352 U.S. 944, 1 L.Ed.2d 239. As shown by the trial record and as found by the Supreme Court of Mississippi, the petitioners in the case at bar made no attempt to introduce any evidence to show there had been any systematic exclusion of individuals because of race from the grand jury, petit jury and venire.

If there was any evidence of systematic exclusion the Supreme Court of Mississippi would have reversed petitioners' convictions as it has done in other cases. *Chinn* v. *State*, 248 So.2d 801 (Miss. 1971); *Caston* v. *State*, 240 So.2d 443 (Miss. 1970); *Spencer* v. *State*, 240 So.2d 260 (Miss. 1970); *Williams* v. *State*, 210 So.2d 780 (Miss. 1968); *Harris* v. *State*, 206 So.2d 829 (Miss. 1968); *Watts* v. *State*, 196 So.2d 79 (Miss. 1966); *Harper* v. *State*, 171 So.2d 129, 251 Miss. 699 (1965).

POINT II

The Search of the Automobile Was Not Unreasonable and in Violation of the Fourth Amendment.

Mrs. Fisher, an employee of the Famous Shop, observed that the petitioners were the only customers in the shop. She also observed that when the petitioners left certain dresses were missing from hangers on which dresses were always kept. If a dress was removed from any one of the hangers for any reason, the hanger would also be removed. Mrs. Fisher went outside the Famous Shop and observed the petitioners who were acting suspiciously. Mrs. Fisher continued to observe the petitioners as they drove an automobile a short distance where they parked it and went into another store. Mrs. Fisher pointed out the automobile to the law enforcement authorities. The petitioners were arrested in the store which they had just entered and they were brought to the automobile which they had been driving and which they had parked on a city street. A search of the automobile revealed the clothing which was taken from the Famous Shop.

Petitioners contend the search was unlawful. However, the petitioners denied any possessory interest in the automobile.[1]

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1. Petitioner Barbara Watkins testified as follows:

Q. But you didn't claim the car then, did you?

A. No, Sir, I didn't.

Q. You told the officers you didn't know nothing about the car, didn't you?

A. I sure did, Mr. Odom. (R. 48)

Petitioner Mary Ruby Thomas also testified that she heard petitioner Barbara Watkins tell the policeman that she (Barbara Watkins) did not drive the automobile. (R. 138)

In regard to petitioner Ruby Thomas, the law enforcement officer testified:

(Continued on following page)

Petitioners admitted to the officers that they did not own and had not driven the automobile in question; however, the officers also knew that the petitioners had in fact driven the automobile to the location where it was parked. On the basis of this knowledge, it would be reasonable for the officers to search the automobile in an effort to determine its owner.

The officers had a legitimate reason for checking the automobile in order to determine the identity of the driver and passengers (petitioners).

As the petitioners denied any ownership, possessory interest and the fact that they had been in the vehicle, the logical conclusion was that the petitioners had stolen the vehicle. That alone would justify the officers in searching the automobile for evidence as to the identity of the thieves and evidence of the crime.

The only alternative would be that the petitioners had abandoned the vehicle in that they denied any knowledge concerning it or any interest in it. The abandonment would likewise justify the search. *United States* v. *Gibson,* 421 F.2d 662 (Fifth Circuit 1970).

In any event upon the arrest of the petitioners, and it must be noted that the validity of the arrest is not questioned, the petitioners would be carried to police headquarters. And, to protect the automobile and its contents

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Footnote continued—

A. She did not say anything other than, "This is not my car; I do not have a car. I walked down here. I do not have a car and this is not my car." (R. 162)

As to petitioner Maggie Thomas, her own testimony was that she did not drive the automobile. (R. 220)

The police officer in testimony referring to the three petitioners stated: "The three of them said, including the defendant, that that was not their car and they did not have a car and that they walked down here." (R. 239)

it was necessary that the officers remove the automobile and its contents from the city streets and take it into their custody. *Hogan* v. *State*, 235 So.2d 704 (Miss. 1970). Since it was the duty of the officers to hold the automobile it would be unreasonable to find that for their protection the officers did not have the duty to search the automobile as they were responsible for its contents and in order to properly account for such contents the officers had to inventory and observe them. *Jackson* v. *State*, 243 So.2d 396 (Miss. 1971).

Further, the petitioners were identified while in the vehicle thereby justifying its seizure and search. *Dorsey* v. *State*, 243 So.2d 550 (Miss. 1971); *Cooper* v. *California*, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788.

As the validity of the arrest is not in question the officers had the duty under any of these circumstances to seize the automobile. The seizure being unquestionably legal the officers could search the vehicle at the scene or at the police station as there is no contention that probable cause was lacking, and as probable cause existed for the search at that instant there was no necessity of obtaining a search warrant based upon the same probable cause. *Chambers* v. *Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970).

In any event, *Jones* v. *United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960), states:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

CONCLUSION

Petitioners failed to show any systematic exclusion in the selection of the grand and petit juries on the basis of race. The search of the automobile was not unreasonable in view of the circumstances and was not a violation of petitioners' Fourth Amendment rights. Therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: .....
TIMMIE HANCOCK
Special Assistant Attorney General

CERTIFICATE

I, Timmie Hancock, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, three copies of the foregoing Brief in Opposition to the Honorable William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This the 30th day of January, 1973.

.....
Special Assistant Attorney General

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,709

BARBARA WATKINS, MARY RUBY THOMAS AND MAGGIE D. THOMAS

v.

STATE OF MISSISSIPPI

PATTERSON, JUSTICE:

The appellants, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, were convicted of "shoplifting" in separate trials by the Circuit Court of the Second Judicial District of Jones County and each was sentenced to serve five years in the state penitentiary. The evidence being almost identical, the cases were consolidated for appeal to this Court.

Two points are argued for reversal. These are (1) that the burden of going forward with the evidence is upon the State to explain the disparity between the percentage of Negroes in the Second Judicial District of Jones County and those on the venire for the year 1970-71 and (2) that the trial court erred in refusing to suppress evidence resulting from an illegal search of an automobile.

Each of the defendants was represented by the same attorneys. On April 9, 1971, the date of the trial of Barbara Watkins, there was filed a motion common to all of the appellants to "quash the indictment, venire and petit venire without prejudice and order the Board of Supervisors of Jones County to prepare a venire selected by random samples from all of the alive persons on the

voter registration books of this district." Incorporated within this motion is a statement that the 1970 census of population, of which courts take judicial notice, indicates that Jones County has 56,357 inhabitants of whom 42,403 are white, 13,810 are Negro, and 144 are other nonwhite persons, a ratio of 75.24% white to 24.76% nonwhite.

This motion, though filed, was not directed to the attention of the court nor a ruling requested thereon in the case of Barbara Watkins or Mary Ruby Thomas until the State had presented its evidence and was then included in each of the defendants' motions to exclude the State's evidence and to direct a verdict for the defendants. We are of the opinion that by accepting the jury the appellants Barbara Watkins and Mary Ruby Thomas waived its composition. Holloway v. State, 242 So.2d 454 (Miss. 1970).

The motion to quash, as well as a motion for a subpoena duces tecum for the voter registration books, etc., in the trial of Maggie D. Thomas was called to the attention of the court prior to the State's presenting its evidence and was overruled by the court as not being timely filed. The appellant, however, made no effort by the introduction of witnesses or otherwise to indicate that the jurors were improperly drawn or selected, or to prove the systematic exclusion of jurors because of sex or race. There was thus nothing before the trial judge to substantiate the motion to quash other than the statement contained in the motion relating to the census report. The motion was renewed at the conclusion of the State's evidence. It reflects there was one black male who served on the petit jury. The absence of any evidence indicative of systematic exclusion of jurors on account of race or sex requires the conclusion on our part that any such objections were effectively waived by the applicant. Gordon v. State, 160

So.2d 73 (Miss. 1964), and Holloway, supra. The mere reference to a census report and thereafter numerically depicting the white-black ratio of a county, without more, is insufficient in our opinion to shift the burden of proof upon a discrimination issue from the movant who has the affirmative of the issue to the State. We conclude this assignment of error to be without merit.

The next contention of the appellants is that an automobile used by them on the date of the alleged crime was searched without probable cause or warrant and hence the articles removed therefrom, later identified as having been stolen, were erroneously admitted into evidence as they were the result of an illegal search in violation of the Fourth Amendment to the Federal Constitution and Section 23, Mississippi Constitution (1890). The record discloses that each of the appellants specifically denied any interest in the automobile. We therefore conclude that none of these appellants had standing to object to the search of the automobile since we stated in *Ball* v. *State*, 194 So.2d 502, 503 (Miss. 1967), the following:

> . . . One testifying that property searched did not belong to him may not thereafter complain that the search was unlawful. Ross v. State, 140 Miss. 367, 105 So. 846 (1925).

See also Canning v. State, 226 So.2d 747 (Miss. 1969), as well as *Baldwin* v. *State*, 213 So.2d 819 (Ala. 1968), where the Supreme Court of Alabama stated:

> The right to protection against an unlawful search is personal, and a defendant in a criminal case who denies any proprietary or possessory interest in seized property has no standing to object to the method of seizure. . . .

Of interest, Fisher, *Search and Seizure*, section 57, page 106 (1970).

We determine the contentions of the appellants relating to the search of the automobile to be without merit.

We have reviewed the records in their entirety and find there was sufficient evidence in each to uphold the jury verdict. There being no merit in the assignments of error, we conclude that the verdicts and sentences of the trial court should be affirmed.

AFFIRMED.

GILLESPIE, C.J., AND SMITH, ROBERTSON AND SUGG, JJ., CONCUR.